FRONT LINE Report

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Several bills would impact officers

Several law enforcement-related bills have been heard in committees since the start of the 2009 legislative session.

LEGISLATIVE UPDATE

To check on a bill's provisions and status, go to www.moga.mo.gov.

OMNIBUS CRIME BILL

House Bill 62 would:

- Allow a court to order payment to the county law enforcement restitution fund for any moving violation.
- Expand the crime of distribution of a controlled substance near a park to include unlawfully distributing or delivering of **any** controlled substance.
- Specify that the Amber Alert System is to help locate abducted children, not adults.
- Require a photograph to be taken

SEE **LEGISLATIVE UPDATE,** Page 2

Undisputed video of driver persuades appellate court

A state appeals court ruled last fall that a trial court's decision that a police officer lacked probable cause to arrest a driver was incorrect.

Rozier v. Director of Revenue
No. 68534,
Mo.App., W.D.
Sept. 30, 2008

Kristin Rozier was stopped at a DWI checkpoint in Kansas City. After smelling alcohol and noting slurred speech, the officer asked Rozier to perform three field sobriety tests: the HGN, walk and turn, and one-leg stand. The officer determined she was drunk; a subsequent breath

SEE **APPELLATE COURT,** Page 6

Chris Koster is sworn in as attorney general by state appellate Judge Joseph Dandurand, now deputy attorney general. Niece Claire Koster holds the Bible.

A message from

Attorney General
CHRIS KOSTER

I am committed to law enforcement

"I look forward to continuing the Attorney General's Office's commitment to working with our outstanding law enforcement community. Having served 10 years as Cass County Prosecuting Attorney, I consider myself part of the law enforcement family. Not since the administration of Tom Eagleton has Missouri had an Attorney General who came from the law enforcement ranks.

My office and I will work to ensure that you have ready access to new information. It is my hope that this newsletter will help provide you with tools and support for the critical work you do.

Front Line Report will be published periodically as laws change, cases break and legislative proposals are created."

Sunshine Law education a priority

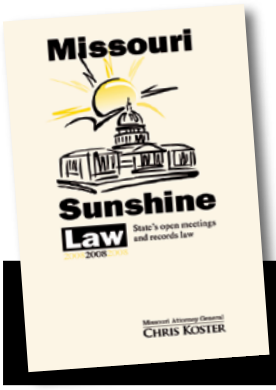
New education director will expand on-site law training

Showing his commitment to a more transparent government throughout Missouri, Attorney General Chris Koster has created a position to educate law enforcement and other government officials on the open meetings and records law.

Tom Durkin has been named public education director, a position in which he will travel throughout the state giving seminars on the Sunshine Law to public agencies from the city to the state level.

Durkin previously served as an administrative assistant in the Missouri Senate and as the communications coordinator for the Missouri Supreme Court. He also has been a schoolteacher and an actor.

"Having a Sunshine Law expert dedicated to offering personal presentations will provide government officials with the support they need to be well informed in conducting their business in a transparent way," Koster said.



> "In keeping with the spirit of the law, I am committed to providing educational support and tools to help law enforcement personnel stay compliant with the Sunshine Law. On-site training will be the centerpiece of that effort."
>
> — **Attorney General Chris Koster**

The Sunshine Law booklet can be found online or ordered for free at **ago.mo.gov/publications.** You also can call **800-392-8222**.

How to schedule a workshop

Law enforcement officers and prosecuting attorneys who would like to schedule a training session on the Sunshine Law may contact Tom Durkin: 573-751-8844 or Tom.Durkin@ago.mo.gov.

LEGISLATIVE UPATE: CONTINUED FROM PAGE 1

of an incarcerated person prior to release and made available to the victim on request.

- Increase the penalty for the crime of making a false report to a class A misdemeanor, and the penalty for resisting arrest to a class C felony.

CRIME LAB REVIEW

SB 8 would create a Crime Laboratory Review Commission, which would independently review operations of crime labs that receive state-administered funding, in order to comply with federal grant requirements.

SHOCK TIME INELIGIBILITY

SB 36 would prohibit those convicted of sexual offenses against a child younger than 17 from being eligible for 120-day "shock time." The full Senate has given initial approval to the bill.

SUNSHINE LAW

HB 316 would:

- Specify that a "quasi-public governmental body" includes any association receiving public funding through dues paid by a public governmental body or its members.
- Include a meeting of newly elected members who have not yet taken office in the definition of a "public meeting" if other requirements are met.
- Allow only members of a public governmental body, their attorneys and staff, and any necessary witnesses, to be present during any closed meeting.
- Require a court to order reimbursement of costs and fees to the party successfully seeking disclosure of information in an investigative report of a law enforcement agency.

Front Line Report is published periodically by the Missouri Attorney General's Office. It is distributed to law enforcement throughout the state. Find issues at ago.mo.gov/lawenforcement.htm

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INSUFFICIENT EVIDENCE

State v. Samuel Freeman

No. SC 89119, Oct. 28, 2008

Samuel Freeman was convicted of first-degree murder after a jury trial. Trial evidence showed that Freeman and the victim were seen flirting and arguing at a bar the night she was killed.

Freeman had been given a distinctively shaped bottle. The victim's vagina had injuries consistent with the shape of that bottle. Freeman's DNA was found on a piece of toilet paper under the victim's body. On appeal, Freeman claimed the evidence was insufficient to sustain his conviction.

The court of appeals does not act as a "super juror" with veto powers. Where a reasonable jury could make the inference that Freeman had the means and opportunity to commit a crime and reliable evidence allows an inference that Freeman was present at the crime scene, the jury may find Freeman guilty.

The state proved that Freeman and the victim had argued and flirted the night she was killed. Freeman left the bar with ample time to commit the murder. The state further proved Freeman was at the crime scene through DNA, eyewitness testimony and his possession of a distinctively shaped bottle that was consistent with the weapon used. This was sufficient to sustain his conviction.

DWI, PERSISTENT OFFENDER, TURNER

State v. Vernon Bizzell

No. 90303, Mo.App., E.D., Oct. 7, 2008

Vernon Bizzell was arrested at a sobriety checkpoint and charged with DWI as a persistent offender. The prior offenses establishing the persistent offender status include a 1989 DWI from the Cape Girardeau Municipal Court that resulted in an SIS and a 2004 St. Charles County Circuit Court DWI.

UPDATE: CASE LAW

Opinions can be found at www.courts.mo.gov

A jury found Bizzell guilty of the class D felony DWI. The trial court sentenced him to a three-year SES. On appeal, Bizzell claimed the Cape Girardeau conviction could not be used as a prior offense pursuant to *Turner*.

Under *Turner*, a prior municipal offense resulting in an SIS cannot be used to enhance punishment under 577.023. Since *Turner* was decided before this appeal was complete, the decision in *Turner* controls. Therefore, the sentence as a persistent DWI offender was reversed. The case was remanded to the circuit court with instructions to allow the state to present other evidence to establish Bizzell's status as a persistent offender.

HEARSAY TESTIMONY

State v. Keith Nabors

No. 90014, Mo.App., E.D., Oct. 21, 2008

Keith Nabors was convicted in a jury trial of three counts of first-degree burglary, two counts of forcible sodomy, two counts of misdemeanor stealing, attempted first-degree burglary, forcible rape, attempted forcible rape, second-degree burglary and felony stealing.

On appeal, he claimed the trial court improperly admitted hearsay testimony when it allowed a police detective to testify about information received from anonymous sources that led to him being investigated as a possible suspect in the crimes.

The testimony did not include any statements that Nabors had committed any unlawful activity or specifically identify him as the perpetrator. Rather, it simply explained the course of the detective's investigation. Moreover, the court gave a limiting instruction with regard to this testimony.

Thus, these statements did not constitute inadmissible hearsay. Even if the statements were hearsay, they were not outcome determinative since the other evidence of Nabor's guilt was overwhelming.

RULE 25.03, BRADY

Jason Merriweather v. State

No. 90312, Mo.App., E.D., Oct. 21, 2008

Following Jason Merriweather's conviction for forcible sodomy, he filed a Rule 29.15 motion for post-conviction relief. After an evidentiary hearing, the motion court concluded that the state had violated Rule 25.03 and *Brady* by failing to discover and disclose the criminal records of the victim, which would have revealed her convictions for retail theft and pending charges for fraudulent use of a credit device.

The state appealed, arguing that the motion court had improperly extended the scope of *Brady* by placing a duty on the state to disclose information it did not possess, unreasonably required the state to discover information that was not discoverable despite due diligence, and incorrectly determined that the missing records were material.

The court held that although the victim's criminal record and pending charges did not come up when the state ran a criminal background check on her, this did not absolve the state from disclosing this information to Merriweather.

Since the victim was the state's primary witness, her credibility was a material issue at trial. This evidence could have been used to impeach her and was favorable to Merriweather.

Although the state did not specifically explain why it had failed to discover this evidence, it is liable for both willful and inadvertent suppression of favorable evidence.

UPDATE: CASE LAW

LATE FILING, MENTAL DISEASE

State v. John Opry

No. 28872, Mo.App., S.D., Oct. 28, 2008

John Opry burglarized the home of a woman who was on vacation. When he returned the next day, two men who were house sitting were in the middle of reporting the burglary. Opry waited until they left then burglarized the home again. The house sitters returned, and Opry shot and killed them. He later returned to the home and set it on fire.

After being arrested, Opry admitted to the killings and apologized to the victims' families. Two years after arraignment and 13 days before trial, Opry filed a motion to allow the filing of a notice of intent to rely on a defense of mental disease or defect. After a hearing, the trial court found that there was no good cause for the tardy notice. The court did allow Opry to put on a diminished capacity defense. On appeal, he claims he should have been allowed to present a defense of mental disease or defect excluding responsibility.

When a defendant fails to file the requisite notice of intent to rely on a defense of mental disease or defect within 10 days after arraignment, he has the burden of showing good cause for the tardy notice. Opry failed to do so. Moreover, he failed to show prejudice as the jury rejected his diminished capacity defense, which negated the possibility of a successful mental disease or defect defense. There was also extensive evidence presented showing Opry's knowledge of the wrongfulness of his conduct.

PROPER FOUNDATION

State v. Ryan Slaughter

No. 28799, Mo.App., S.D., Nov. 5, 2008

Ryan Slaughter was convicted of first-degree robbery and armed criminal action. During trial, a recording of telephone conversations between Slaughter and others that took place while Slaughter was incarcerated in another state was played over his objection of no proper foundation. The arresting officer was also allowed to testify that after he read Slaughter the Miranda rights, he said he did not want to talk.

On appeal, Slaughter claims the phone recording should not have been admitted and the officer should not have been allowed to testify regarding his post-Miranda silence.

The court determined that an objection that there is a lack of foundation, without further specificity, does not sufficiently state grounds for denying admission of evidence and does not preserve the issue for appeal.

The court further determined that the trial court did not commit plain error in allowing the officer to comment on Slaughter's post-Miranda silence. While this generally would be considered error, there was no manifest injustice. A defendant's silence can be mentioned if it is not used as affirmative proof of guilt nor to impeach testimony.

INSUFFICIENT EVIDENCE, INTENT

State v. Duone Hairston

No. 28909, Mo.App., S.D., Nov. 6, 2008

Duone Hairston was convicted of possession of marijuana with intent to distribute.

Trial evidence showed that an officer saw Hairston throw a large bag into a dumpster. When the officer retrieved the bag, the only one in the dumpster, it contained rolling papers, torn plastic baggies, marijuana seeds and stems from marijuana plants. The baggies were "corner baggies," which are known to be used in the packaging and distribution of marijuana.

The officer also testified that Hairston responded "that's my money" when asked what he did with the money he got from selling weed. On appeal, Hairston claims this evidence was insufficient to sustain his conviction.

While proof of possession of a small amount of a controlled substance, by itself, is an insufficient basis from which an intent to distribute may be inferred, there was sufficient evidence to establish Hairston's intent.

Intent is generally not susceptible of direct evidentiary proof and may be established by circumstantial evidence or inferred from surrounding facts. Although isolated facts viewed individually may not support more than a suspicion of guilt, a conviction may rest on accumulated, inter-dependent facts.

PRE-, POST-MIRANDA WARNINGS

State v. Terrell Gaw

No. 28715, Mo.App., S.D., Nov. 7, 2008

Terrell Gaw was convicted of felony DWI. The arresting officer was the sole witness at trial. He testified that when he arrived at the scene of a one-vehicle crash, Gaw was rummaging through the truck.

Based on numerous observations, the officer concluded he was drunk. In response to questions, Gaw said he owned the truck but that it was being driven by his girlfriend or her friend. The officer then asked Gaw about marijuana. He gave the officer a bag of what appeared to be marijuana. Gaw was arrested.

The officer continued to question Gaw, who eventually admitted he had been driving at the time of the crash. Only later, while on the way to jail, did the officer give Miranda warnings. Gaw again admitted to driving.

On appeal, Gaw claims his pre-Miranda admissions to driving should have been excluded. The court agreed. The officer engaged in custodial interrogation without Miranda warnings. The fact that Gaw made more statements after being read the Miranda warnings did not render the pre-Miranda statements admissible. When pre– and post-Miranda statements are part of one continuous inquiry, none of the statements is admissible.

INNOCENCE, CASE TRIED ON OWN

State v. Harold Helms

No. 28434, Mo.App., S.D., Oct. 10, 2008

The victim testified that when she was 13, she attended a party at the home of defendant Harold Helms, who was then 20. Also at the party was co-defendant Jeffrey White. At some point, the victim and Helms went outside and he told her to follow him to a wooded area. White was there.

She was thrown to the ground and her pants and panties removed. One of the men had sex with her while the other held her hands. She believed that the men switched places and both had sex with her. The men threatened to harm her if she told anyone. The teenager did disclose the rape several months later.

White was convicted of statutory rape. Helms was charged in separate counts with first-degree statutory rape as a principal and in the second count as an accomplice. At Helms' trial, evidence of White's conviction was introduced over his objection. On appeal, he claimed the court erred in admitting this evidence.

The fundamental presumption of innocence entitles every defendant to have his case decided on its own merits, without having the issue of guilt prejudged by what happened to any other defendant charged with the same crime.

Every defendant who joins in the commission of a crime is liable, on his own, as a principal. But, he is entitled to be tried on his own. The old rule that made it proper, and perhaps necessary, to show the conviction of the principal before an accessory could be convicted has been changed.

UPDATE: CASE LAW

INSUFFICIENT EVIDENCE, FORCIBLE COMPULSION

State v. Jose Lopez-McCurdy

No. 27921, Mo.App., S.D., Oct. 27, 2008

Jose Lopez-McCurdy was convicted of forcibly raping his cousin.

Lopez-McCurdy had previously threatened, sexually assaulted and beaten her. He was 15 and considerably larger than the victim, who was 14.

On the night in question, the defendant, victim and other children were playing hide and seek. During the game, Lopez-McCurdy gave the victim beer, led her to a secluded spot and told her to lie down. He got on top of her and raped her. He used his weight to hold her down and held her wrists above her head.

On appeal, he argued that the evidence was insufficient to show forcible compulsion.

The court determined there was sufficient evidence of forcible compulsion. Factors to be considered are whether violence or threats preceded the sexual act, the relative ages of the victim and accused, the atmosphere and setting of the incident, the extent to which the defendant was in a position of authority, domination and control over the victim, and whether the victim was under duress.

A victim is not required to resist when she submits to an offensive act out of fear or personal harm.

Evidence showed that Lopez-McCurdy had previously threatened and beaten her, was larger and older, used his weight and hands to hold her down, and raped her after giving her beer in a dark, secluded spot. This was sufficient to show compulsion although she did not resist and Lopez-McCurdy said nothing more than "lay down."

DOUBLE JEOPARDY, SELF-REPRESENTATION

State v. M.L.S.

No. 68568, Mo.App., W.D., Oct. 21, 2008

M.L.S. was convicted of four counts of third-degree domestic assault, resisting lawful detention, and obstructing government operations.

On appeal, he claimed that convicting him of two counts of domestic assault that happened at the same time on the same day violated his right to be free from double jeopardy. He also claimed that he should have been allowed to act as his own co-counsel because he is a licensed attorney.

The court found that Section 566.074 provides that a person is guilty of third-degree domestic assault if he purposely places a family member in apprehension of physical injury or knowingly causes contact with a family or household member knowing such person will regard the contact as offensive.

M.L.S. verbally threatened and pushed his wife. Although these acts were part of a single and uninterrupted event, they were two distinct acts requiring two distinct mens rea. Thus, M.L.S. was not punished twice for a single act but was punished for two distinct offenses under different statutory provisions.

The court also found that while a defendant does have the right to represent himself in criminal proceedings, he does not have the right to hybrid representation — a combination of self-representation and assistance of counsel. There is no exception in Missouri law that would allow hybrid representation simply because the defendant is a licensed attorney.

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Sign up now for basic DWI training

The Missouri Office of Prosecution Services is offering a basic course on DWI enforcement that focuses on teamwork and cooperation in the investigation and prosecution of DWI cases.

The course, titled "Protecting Lives, Saving Futures," will be presented in Columbia on Feb. 25-27.

Lodging and morning meals will be provided; participants' agencies would pay for the cost of transportation and evening meals.

The course qualifies for POST continuing education credit. If interested, please contact Susan Glass at 57-3751-1629 or Susan.Glass@ago.mo.gov. Space is limited.

UPDATE: CASE LAW

FINDINGS OF FACT

Paul Taylor v. State

No. 68964, Mo.App., W.D., Oct. 28, 2008

Paul Taylor filed a motion for post-conviction relief claiming his trial counsel was ineffective in failing to introduce an exhibit and for failing to restate a question to the venire panel after an objection to the initial question was sustained.

The motion court entered its order denying the motion stating that trial counsel "was not ineffective, as a review of the transcript shows, for failing to offer defendant's Exhibit A into evidence or for failing to rephrase a question after the court had in part validated defense counsel's point."

On appeal, Taylor claims he was entitled to specific findings of fact on his claims.

The court agreed, finding that a motion court must make specific findings of fact to support its conclusions of law. Findings cannot be supplied by implication from the order. Without sufficient findings from the motion court, meaningful appellate review cannot be had.

APPELLATE COURT:

CONTINUED FROM PAGE 1

test detected her blood alcohol level at .175 percent.

A hearing was held on Rozier's license revocation and the trial court ruled her license should be reinstated because the officer had no probable cause to arrest. The state appealed. Normally, the appeals courts are limited solely to deciding whether a trial court's decision is legally correct; issues of fact are not subject to review.

Here, however, the stop was videotaped by the officer's car camera and the appeals court ruled the judgment of the trial court was "against the weight of the evidence."

In administrative revocation cases, the issue is whether a prudent officer would believe, based on observing Rozier, that she was drunk.

The Western District noted that the video showed Rozier did slur words, stagger, and was unable to perform the sobriety tests. Thus, the issue is not whether the trial court could interpret her actions differently from the officer but, instead, whether those "readily apparent" actions gave a prudent officer a legitimate basis to conclude Rozier was intoxicated.